Blank Page

FILE COPY

Office - Supreme Court, U. S.
FILED
DEC 12 1940
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

No. [redacted]97

OLGA E. VOELLER ET AL.,
Petitioners,

vs.

THE NEILSTON WAREHOUSE COMPANY ET AL.,
Respondents.

BRIEF OF RESPONDENTS.

Due process of law inhibits the taking of one man's property and giving it to another without notice and an opportunity to be heard before a competent tribunal.

A statute creating a presumption which operates to deny a fair opportunity to rebut it is violative of due process.

Principles of local law, including those governing the relationship of shareholders INTER SE and with the corporation, announced by the Supreme Court of Ohio will be accepted by this Court.

FRANCIS J. WRIGHT,
Attorney for Respondents.

EARL F. MORRIS,
CHARLES A. SCHWENKER,
ARNOLD, WRIGHT, PURPUS & HARLOR,
KRUMM & SCHWENKER,
Of Counsel for Respondents.

RODENFELS LAW PRINTING COMPANY, Columbus, Ohio

Blank Page

INDEX.

Opinion below	1
Statement of case	1
The statute involved	6
Summary of points discussed	6
Argument	7
I. A corporation is governed by the law of the state of its incorporation and this includes the relationship of shareholders inter se and with the corporation	7
II. This Court will accept the decision of the Supreme Court of Ohio on the construction of Ohio statutes and on the common law of Ohio	8
III. Due process of law requires notice and an opportunity to be heard	10
IV. A statute creating a presumption which operates to deny a fair opportunity to rebut it is violative of due process	11
V. The statute provides for no notice to the majority shareholders of the demands of the dissenters, and they receive none	12
and they received none	12

VI. The majority shareholders had no opportunity to be heard 17
VII. Miscellaneous points 19
Principles of statutory construction 19
Practical operation of statute 20
Estoppel 21
Res judicata 22
Conclusion 23

Cases and Authorities Cited.

13 Am. Juris., 504 18
American Ry. Express Co. v. Kentucky, 273 U. S., 269; 71 L. ed., 639 (1927) 9

Bailey v. Alabama, 219 U. S., 219; 55 L. ed., 191 (1911) 11
Baltimore & Ohio R. Co. v. U. S., 298 U. S., 349; 80 L. ed., 1209 (1936) 10
Baltimore C. & A. Ry. Co. v. Godeffroy et al., 182 Fed., 525 (C. C. A. 4th, 1910) 14
Black et al. v. Zacharie & Co., 3 How., 483, 511; 11 L. ed., 690, 703 (1845) 7

14 C. J., 924 18
C. & O. R. R. Co. v. Kentucky, 179 U. S., 388; 45 L. ed., 244 (1900) 9
Coe v. Armour Fertilizer Works, 237 U. S., 413; 59 L. ed., 1027 (1915) 10, 14
Continental Assurance Company v. Tennessee, decided by the United States Supreme Court on October 21, 1940 9

Detroit Fidelity & Surety Co. v. Keys, 14 O. L. A., 76 (1932) 23

Fairfield v. Gallatin County, 100 U. S., 47; 25 L. ed., 544 (1879) 7
Farncomb v. City and County of Denver, 252 U. S., 7; 64 L. ed., 424 (1920) 9

Geiger v. American Seeding Machine Co., 124 O. S., 222; 177 N. E., 594 (1931) 12, 13, 15, 16
Georgia R. & Elec. Co. v. Decatur, 295 U. S., 165, 170; 79 L. ed., 1365, 1369 (1935) 8
Gregg Dyeing Co. v. Query, 286 U. S., 472, 480; 76 L. ed., 1232, 1238 (1932) 13, 22

Harding v. Talbott, 60 O. App., 523; 22 N. E. (2d), 221 (1938) 23
Heiner v. Donnan, 285 U. S., 312, 329; 76 L. ed., 772, 781 (1932) 11
Herbert v. Louisiana, 272 U. S., 312; 71 L. ed., 270 (1926) 13, 22
Hicklin v. Coney, 290 U. S., 169, 172; 78 L. ed., 247, 250 (1933) 8
Hizar v. Cowan, 51 O. App., 1; 199 N. E., 196 (1935). 23

Manley v. Georgia, 279 U. S., 1; 73 L. ed., 575 (1929) 11
McGarry v. Lentz, 13 F. (2d), 51 (C. C. A. 6th, 1926) 16
McQuillen v. National Cash Register Co., 22 Fed. Supp., 867 (1938) 15
Miller v. Canton Motor Coach, Inc., 58 O. App., 94; 16 N. E. (2d), 486 (1937); appeal dismissed 133 O. S., 384; 14 N. E. (2d), 15 (1938) 20
Morehead v. N. Y. ex rel. Tipaldo, 298 U. S., 587, 609; 80 L. ed., 1347, 1354 (1936) 9

Neblett v. Carpenter, 305 U. S., 297; 83 L. ed., 182 (1938) 9, 22

10 O. Juris., 343, 352, 361 18
Ochoa v. Hernandez Y Morales, 230 U. S., 139, 161; 57 L. ed., 1427, 1437 (1913) 10

Powell v. Alabama, 287 U. S., 45; 77 L. ed., 158 (1932) 10

Railroad Com. of Cal. v. Pacific G. & E. Co., 302 U. S., 388; 82 L. ed., 319 (1938) 10
Roe v. Kansas ex rel. Smith, 278 U. S., 191; 73 L. ed., 259 (1929) 9
Rogers v. Guaranty Trust Co., 288 U. S., 123; 77 L. ed., 652 (1933) 7

Schlessinger v. Wisconsin, 270 U. S., 230; 70 L. ed., 557 (1926) 11
Smiley v. Kansas, 196 U. S., 447, 455; 49 L. ed., 546, 550 (1905) 9

Taylor Co. v. Southern Pacific Co., 122 Fed., 147 (1903) 15
Thomas v. Kalbfus, Rec'r, 97 O. S., 232, 239 (1918).. 16
6 Thompson on Corporations, 452..... 18

Ward v. Krinsky, 259 U. S., 503, 510; 66 L. ed., 1033, 1036 (1922) 8
Weidenfeld v. Northern Pacific Ry. Co., 129 Fed., 305 (C. C. A. 8th, 1904)..... 15
Western & Atlantic R. R. v. Henderson, 279 U. S., 639; 73 L. ed., 884 (1929)..... 11
White Estate, etc., v. Trustees, 21 O. L. A., 528 (1936) 23
Williams v. National Pump Corp., 46 O. App., 427; 188 N. E., 756 (1933)..... 20
W. W. Cargill Co. v. Minn. ex rel. R. R. & W. Com., 180 U. S., 452, 466; 45 L. ed., 619, 626 (1901).... 9

IN THE

Supreme Court of the United States

No. 1035.

OLGA E. VOELLER ET AL.,
Petitioners,

vs.

THE NEILSTON WAREHOUSE COMPANY ET AL.,
Respondents.

BRIEF OF RESPONDENTS.

OPINION BELOW.

The only reported opinion of the courts below is that of the Supreme Court of Ohio in 136 O. S. 427; 26 N. E. (2d) 442.

STATEMENT OF CASE.

The statement of facts, in petitioners' brief, is so meager that we deem it necessary to make a rather complete statement.

The G. W. Bobb Company was incorporated in 1903 and carried on a wholesale grocery business in Columbus, Ohio, for many years. In 1925 it encountered bad

times and negotiated for the sale of its business, property and assets. As a result of these negotiations it sold all of its merchandise to The Midland Grocery Company. (R. 50.) There being no proposal to purchase its remaining assets, nothing was then done in respect thereto. The company at that time owned a large building which it had used in its business and it also owned another piece of real estate located nearby. After the sale of its merchandise both pieces of real estate were listed with several real estate dealers in an effort to dispose of them so that the company could liquidate. A number of offers were received but none which the board of directors would accept. The company was not operating any business; it was simply endeavoring to liquidate as soon as it could sell the remainder of its property. (R. 52-53.) In 1926, the second piece of real estate mentioned above was disposed of and the proceeds from this sale were used to retire the company's preferred stock. (R. 53.) In 1927 the name of the corporation was changed to The Neilston Warehouse Company and at the same time its articles of incorporation were amended so as to permit it to engage in a warehousing business until it could sell the remaining property and complete liquidation.

In April, 1936, it received a proposal for the purchase of the large building referred to above which its directors were willing to submit to the shareholders. This proposal came from the Irwin Realty Company, which offered to pay $101,560.00 and assume the first mortgage on the property of approximately $70,000.00. Of the $101,560.00, $25,000.00 was to be paid in cash and the balance was to be evidenced by a note secured by a second mortgage payable over a period of years. A special meeting of the shareholders was called to con-

sider the proposal. Not quite two-thirds of the shares were voted in favor of the proposal, as was required by law, and hence the proposal was not accepted. (R. 54-55.)

In May, 1936, the company received an offer from The Creasey Corporation of Louisville, Ky., to purchase the property for $126,950.00 and assume the first mortgage of approximately $70,000.00. Of this purchase price $25,000.00 was to be paid in cash and the balance was to be evidenced by a note secured by a second mortgage on the property payable over a period of years. (R. 55.)

The shareholders were duly notified of this proposal and a special meeting was held on June 2, 1936. Of the 5078 shares issued and outstanding, 4783 shares were represented at the meeting either in person or by proxy. Of these, 3658 shares voted for the proposal and 1125 shares voted against the proposal. More than two-thirds of the shares having voted for the proposal, the sale was consummated. (R. 2; 4.)

The Board of Directors at a meeting held on June 16, 1936, discussed the appointment of a liquidating agent to handle the distribution of assets to the shareholders. (R. 29.)

The holders of 818 of the 1125 dissenting shares, presumably acting under § 8623-72 of the Ohio General Code, thereafter filed written objections and demands with the company within the twenty day period fixed by the statute. Other shareholders had no notice of such demands. The president of the company by letter refused the demands, although no director's meeting was held in respect thereto. (R. 55; 62.)

It should here be noted that all of the shareholders became such before the enactment of the statutory provisions here in question. (R. 58.)

On August 13, 1936, the directors authorized dissolution proceedings, appointed the defendant, The Ohio National Bank, as liquidating agent, and thereafter transferred and delivered to it all cash and remaining assets, including accounts receivable and the note and mortgage of The Creasey Corporation. (R. 3.)

No suits were filed either by the corporation or by the dissenting shareholders within the six months' period prescribed in § 8623-72.

On January 8, 1937, suits were filed by certain dissenting shareholders. These dissenters sought to recover judgments for the amounts specified in the demands filed by them which were substantially $100.00 per share, upon the theory that the conclusive presumption contained in the seventh paragraph of § 8623-72 foreclosed any inquiry into the fair cash value of their shares. (R. 1-4.) The defendants (respondents here) by answers challenged the constitutionality of this paragraph as being violative of the due process clause of the 14th Amendment to the Constitution of the United States and claimed that the proceeds of the sale should be distributed pro rata among all shareholders alike. (R. 4-7.)

All the cases were tried together and have since proceeded as a consolidated case. The trial court sustained the contention of the defendants and entered judgments for the defendants. (R. 89, 14.) The Court of Appeals, by a divided court, reversed. (R. 93) The Supreme Court of Ohio reversed the Court of Appeals and affirmed the trial court, the syllabus of its opinion being as follows:

"1. The constitutionality of a law may be determined by its operative effect.

2. A statute, the operative effect of which is to deprive a person of his property without notice and

without opportunity to be heard before a competent tribunal, is violative of Section 1 of the 14th Amendment to the Federal Constitution.

3. That part of Section 8623-72, General Code, creating a conclusive presumption in favor of minority stockholders of a corporation who have demanded the fair cash value of their shares constitutes a denial of due process to the majority in failing to afford them an opportunity to repel it, and has an unconstitutional operation." (R. 74.)

The case is here on allowance of petition for writ of certiorari.

It will be noted from the above statement that the dissenting shareholders who filed demands have claimed for the most part $100.00 per share. The total of all of these claims is $72,160.00. The total amount for distribution, after the payment in full of The Creasey Corporation note, with interest, will be approximately $130,000.00. A pro rata distribution of this latter amount, share and share alike, among all the shareholders, would be approximately $25.00 per share. The dissenters who filed demands owned 16% of the shares. If all of their claims were to be allowed they would receive almost 57% of the amount to be distributed. The remaining shareholders, holding 84% of the shares, would receive only about 43% of the amount to be distributed or about $58,000.00. Most of the dissenters would receive $100.00 per share, whereas the holders of the remaining 4260 shares would receive only about $13.00 per share.

THE STATUTE INVOLVED.

§ 8623-72 of the General Code of Ohio is quoted at pages 5-7 of petitioners' brief.

As originally enacted in 1927 the Ohio Corporation Code did not contain the conclusive presumption now found in the seventh unnumbered paragraph of § 8623-72.

The 1929 amendment, introducing the conclusive presumption, was a novel and unique departure from existing corporation statutes. No similar provision had been enacted by any state. Nor had it been included in the Uniform Corporation Act. The National Conference of Commissioners on Uniform Laws has not since its adoption in Ohio included a similar provision in the Uniform Act. No other state has it except Rhode Island, which recently copied it from Ohio.

SUMMARY OF POINTS DISCUSSED.

I. A corporation is governed by the law of the state of its incorporation and this includes the relationship of shareholders inter se and with the corporation.

II. This Court will accept the decision of the Supreme Court of Ohio on the construction of Ohio statutes and on the common law of Ohio.

III. Due process of law requires notice and an opportunity to be heard.

IV. A statute creating a presumption which operates to deny a fair opportunity to rebut it is violative of due process.

V. The statute provides for no notice to the majority shareholders of the demands of the dissenters and they received none.

VI. The majority shareholders had no opportunity to be heard.

VII. Miscellaneous points.

ARGUMENT.

I.

A Corporation Is Governed by the Law of the State of Its Incorporation and This Includes the Relationship of Shareholders Inter Se and With the Corporation.

A corporation, being the creature of the state of its incorporation, is governed and controlled by the local law of that state. This includes the relationship between the shareholders *inter se* and with the corporation. Such local law becomes a rule of property governing such relationships. *Black et al.* v. *Zacharie & Co.*, 3 How. 483, 511; 11 L. ed. 690, 703 (1845); *Fairfield* v. *Gallatin County*, 100 U. S. 47; 25 L. ed. 544 (1879); *Rogers* v. *Guaranty Trust Co.*, 288 U. S. 123; 77 L. ed. 652 (1933).

The relationship of the shareholders of The Neilston Warehouse Company, in the situation with which we are here dealing, is governed by the law of Ohio. A statement of that law is made in the decision of the Supreme Court of Ohio. That Court, in construing the pertinent statutes of Ohio relating to a corporation and its shareholders, has announced the principles which govern the status of the shareholders and their relationship *inter se* and with the corporation.

II.

This Court Will Accept the Decision of the Supreme Court of Ohio on the Construction of Ohio Statutes and on the Common Law of Ohio.

It is well settled that this Court, when dealing with the constitutionality of state statutes challenged under the Fourteenth Amendment of the Federal Constitution, will accept the construction of such statutes by the highest court of the state.

> "In the exercise of our appellate jurisdiction we are bound by the construction of the state law adopted by its court of last resort; * * *. Our function is confined to determining whether, as so construed and as applied to the concrete facts of the case, the statute contravenes the limitations imposed by the 14th Amendment upon state action."
>
> *Ward* v. *Krinsky*, 259 U. S. 503, 510; 66 L. ed. 1033, 1036 (1922).

> "The decision of the state court is controlling as to the meaning and extent of the statutory requirements."
>
> *Hicklin* v. *Coney*, 290 U. S. 169, 172; 78 L. ed. 247, 250 (1933).

> "By that construction" (that of the state Supreme Court) "we are bound, and in accordance with it must consider and determine the case. The construction becomes part of the statute as much as though it were found in appropriate words in its text."
>
> *Georgia R. & Elec. Co.* v. *Decatur*, 295 U. S. 165, 170; 79 L. ed. 1365, 1369 (1935).

> "The questions just stated are questions of local law, and in determining whether the statute violates

any right secured by the Federal Constitution we must, in the particulars named, accept the interpretation put upon it by the state court."

W. W. Cargill Co. v. *Minn. ex rel. R. R. & W. Com.*, 180 U. S. 452, 466; 45 L. ed. 619, 626 (1901).

C. & O. R. R. Co. v. *Kentucky*, 179 U. S. 388; 45 L. ed. 244 (1900).

Smiley v. *Kansas*, 196 U. S. 447, 455; 49 L. ed. 546, 550 (1905).

Farncomb v. City and County of Denver, 252 U. S. 7; 64 L. ed. 424 (1920).

Roe v. *Kansas ex rel. Smith*, 278 U. S. 191; 73 L. ed. 259 (1929).

Morehead v. *N. Y. ex rel. Tipaldo*, 298 U. S. 587, 609; 80 L. ed. 1347, 1354 (1936).

Neblett v. *Carpenter*, 305 U. S. 297; 83 L. ed. 182 (1938).

Continental Assurance Company v. *Tennessee*, decided by United States Supreme Court on October 21, 1940.

Likewise in such cases, this Court will accept the applicable common law of the state as announced by the highest court of the state.

American Ry. Express Co. v. *Kentucky*, 273 U. S. 269; 71 L. ed. 639 (1927).

We recognize, of course, that the ultimate question of due process is for this Court. The Supreme Court of Ohio has, however, in its decision, construed certain Ohio statutes and announced certain principles of common law relating to Ohio corporations and their shareholders. Under the above decisions this Court will give effect to such statutory construction and such principles of local law in determining whether or not due process has been denied.

It should be noted that the decision below did not *deny* —but, on the contrary, *upheld*—the constitutional rights of respondents.

III.

Due Process of Law Requires Notice and an Opportunity to Be Heard.

For convenience we will refer to the dissenting shareholders who filed demands as the "dissenters" or as "dissenting shareholders," and to the remaining shareholders as the "majority" or as "majority shareholders."

Stated briefly, the position of the respondents (defendants below) is that *notice* and an *opportunity to be heard* are of the most important elements of due process of law; that the failure of the statute to provide either for notice to the majority or an opportunity for them to be heard before a competent tribunal, coupled with the conclusive presumption, operates, under the circumstances of this case, to deprive them of their property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

It is elementary that notice and an opportunity to be heard are indispensable requirements of due process.

> "Whatever else may be uncertain about the definition of the term 'due process of law,' all authorities agree that it inhibits the taking of one man's property and giving it to another, contrary to settled usages and modes of procedure, and without notice or an opportunity for a hearing."
>
> *Ochoa* v. *Hernandez Y Morales*, 230 U. S. 139, 161; 57 L. ed. 1427, 1437 (1913).

Baltimore & Ohio R. Co. v. *U. S.*, 298 U. S. 349; 80 L. ed. 1209 (1936).

Powell v. *Alabama*, 287 U. S. 45, 77 L. ed. 158 (1932).

Coe v. *Armour Fertilizer Works*, 237 U. S. 413; 59 L. ed. 1027 (1915).

Railroad Com. of Cal. v. *Pacific G. & E. Co.*, 302 U. S. 388; 82 L. ed. 319 (1938).

There is no dispute here as to this principle.

IV.

A Statute Creating a Presumption Which Operates to Deny a Fair Opportunity to Rebut It Is Violative of Due Process.

This Court has repeatedly declared that a statutory conclusive presumption is such a presumption and is, therefore, invalid under the due process clause.

> "This court has held more than once that a statute creating a presumption which operates to deny a fair opportunity to rebut it violates the due process clause of the 14th Amendment."
>
> *Heiner* v. *Donnan*, 285 U. S. 312, 329; 76 L. ed. 772, 781 (1932).
>
> *Schlessinger* v. *Wisconsin*, 270 U. S. 230; 70 L. ed. 557 (1926).
>
> *Bailey* v. *Alabama*, 219 U. S. 219; 55 L. ed. 191 (1911).

A similar declaration has been made concerning even *prima facie* presumptions which operate to deny the requisites of due process.

> "A statute creating a presumption that is arbitrary or that operates to deny a fair opportunity to repel it violates the due process clause of the 14th Amendment. * * Mere legislative fiat may not take the place of fact in the determination of issues involving life, liberty or property."
>
> *Manley* v. *Georgia*, 279 U. S. 1, 73 L. ed. 575 (1929).
>
> *Western & Atlantic R. R.* v. *Henderson*, 279 U. S. 639; 73 L. ed. 884 (1929).

V.

The Statute Provides for No Notice to the Majority Shareholders of the Demands of the Dissenters and They Received None.

The controversy here is as to the manner of the distribution of the assets of a corporation in liquidation. It is purely a controversy between two classes or groups of shareholders, (1) dissenting and (2) non-dissenting. Accordingly, only the individual rights of shareholders are involved. This was the holding not only in the decision below but also in *Geiger* v. *American Seeding Machine Co.*, 124 O. S. 222; 177 N. E. 594 (1931). That the decison below is sound is clear from the fact that the corporation, being in liquidation, was a mere stakeholder of certain property which it was required to distribute to the only interested parties—the shareholders.

§ 8623-72 provides that after the demands of the dissenters, the corporation shall inform such dissenters whether it will meet such demands or shall make a counter-offer. The only notice provided for is to the corporation. None is provided for the majority shareholders. That they received no actual notice in the case at bar is, of course, conceded. Petitioners attempt to meet this requisite of due process by resort to constructive or imputed notice.

First, it is urged that the majority shareholders, having voted in favor of the sale at the meeting held pursuant to § 8623-65, and knowing that certain votes were cast against the sale, were charged with notice of further proceedings taken pursuant to § 8623-72. (Petitioners' brief, pp. 33-36.) These are two separate and distinct

provisions—each relating to a separate subject matter. The former deals with corporate action taken by shareholders; the latter with the rights of shareholders. There is nothing in reason or authority to suggest that, merely because certain shareholders dissented to certain corporate action, they would file demands under § 8623-72 or that, if filed, these demands would be rejected. The voting and the later conduct of the dissenters were separate and distinct matters. There is obviously nothing in the mere fact of dissent which suggests further individual action. The Ohio Supreme Court, however, both in the instant case and in its earlier decision in *Geiger* v. *American Seeding Machine Co.*, supra, has construed these two sections as being "separate and distinct and (to) cover different subjects." That Court, further construing these two statutes, has held that by voting under the former, the majority were not chargeable with notice of proceedings under the latter, because "the voting and the later conduct of the minority were separate and distinct matters." These are plainly matters of statutory construction. Moreover, they relate to corporate relationships. Accordingly, the decision of the Ohio Supreme Court will be accepted by this Court.

Gregg Dyeing Co. v. *Query*, 286 U. S. 472, 480; 76 L. ed. 1232, 1238 (1932).
Herbert v. *Louisiana*, 272 U. S. 312; 71 L. ed. 270 (1926).

Secondly, it is argued that the majority shareholders, knowing of the authorization of the sale, should have kept themselves advised as to whether further proceedings were taken by the dissenters. (Petitioners' brief, p. 37.) The right to notice guaranteed by due process is sub-

stantial and is not satisfied by what a person *might* discover upon inquiry which he is under no obligation to make. This Court has held that even actual notice which is received extra-officially or casually is not adequate for due process.

> "Extra-official or casual notice, or a hearing granted as a matter of favor or discretion in proceedings for the taking of one's property to satisfy his alleged debt or obligation, is not a substantial substitute for the due process of law which U. S. Const., 14th Amend., requires."
>
> *Coe* v. *Armour Fertilizer Works*, supra. (Headnote 6.)

The compliance with the requirement of notice urged here falls far short of this. There was no actual notice—extra-official, casual or otherwise. Speculation that certain action might be taken is urged as filling the requirement, but this, obviously, is not notice at all. Moreover, what we have said above is also a complete answer here—the Ohio Supreme Court has construed the statute authorizing the sale and the statute under which proceedings may be taken by dissenting shareholders as being separate and distinct.

Thirdly, it is urged that the requirement of notice may be satisfied on the ground that the board of directors represents the majority shareholders and that notice to it is notice to the majority. (Petitioners' brief, pp. 32-33.) It is elementary that the board of directors is not the representative of the shareholders as respects their *individual* rights but only in *corporate* matters, or, as it was stated in *Baltimore C. & A. Ry. Co.* v. *Godeffroy et al.*, 182 Fed. 525 (C. C. A. 4th, 1910):

> "* *; the suit being in effect one between different classes of stockholders in which the corporation is

presumptively indifferent and does not represent either class as against the other.'"

Geiger v. *American Seeding Machine Co.*, supra.
Weidenfeld v. *Northern Pacific Ry. Co.*, 129 Fed. 305 (C. C. A. 8th 1904).
McQuillen v. *National Cash Register Co.*, 22 Fed. Supp. 867 (1938).
Taylor Co. v. *Southern Pacific Co.*, 122 Fed. 147 (1903).

Especially is this so when the corporation is in liquidation and nothing remains to be done except distribute the assets to the shareholders. They and only they *as individuals* are interested in the method of distribution. Since only the individual rights of shareholders *inter se* were involved, they were themselves entitled to notice. Accordingly, notice to the corporation was not, in these circumstances, notice to the shareholders. If the dissenters receive the disproportionate shares they have demanded, the majority shareholders, and not the board or the corporation, are the ones who are deprived of their property. While we believe these principles to be sound law, they have, in any event, been declared by the Supreme Court to be the law of Ohio and will be accepted by this Court.

Fourthly, the petitioners argue that the relationship between the shareholders and the corporation is contractual; that the shareholders are presumed to know the law of Ohio; that the statutes of Ohio, specifically §8623-55, are read into the contractual relationship and by such provisions the shareholders are bound. (Petitioners' brief, pp. 45-46.) It is true that the relationship of the shareholders with the corporation and *inter se* is characterized as contractual. *Geiger v. American Seed-*

ing Machine Co., supra. The scope and extent of the contractual duties and obligations of such relationship, however, is quite another matter. It may well be doubted whether the principle has ever been extended to include situations where only the individual rights of shareholders are involved as distinguished from those where shareholders have been held to be bound by acts of the corporation, as their representative, in respect to corporate activities and transactions or to matters affecting the corporation, as such. But the nature and scope of such relationship is for determination by the Ohio Supreme Court. It has intimated, though not decided, that too broad an extension of this principle might invalidate a statute on other grounds. *Geiger v. American Seeding Machine Co.*, supra. Likewise, that Court has suggested that only statutory provisions in effect at the time of purchase of stock can become part of the contract. *Thomas v. Kalbfus, Rec'r.*, 97 O. S., 232, 239 (1918). See also: *McGarry v. Lentz*, 13 F (2d) 51 (C. C. A. Sixth, 1926). The shareholders here became such before the conclusive presumption provision of §8623-72 was enacted. The Supreme Court of Ohio has never held that the principle of contractual relationship applicable in Ohio was so broad as to include the theory that shareholders, because of contract or status, are bound by acts or omissions of the corporation under any and all circumstances—and, especially, where only their individual rights are concerned. On the contrary, that Court, in the decision below, rejected this principle which is commented on in the dissenting opinion of Judge Myers as the reason for his dissent. Six of the seven judges of the Supreme Court of Ohio have held that, in these circumstances, the corporation was not the representative of

the majority shareholders—and, in effect, that, neither by contract nor because of status, was such representation by the corporation to be found or implied. They held, in effect, that the majority shareholders had not consented in advance to being represented by the corporation in the circumstances outlined in §8623-72.

It will be observed that §8623-55, referred to by petitioners, is specifically limited to the "capacity" of the "corporation" and provides that the board of directors shall manage and conduct the "business of the corporation." Neither of these strictly corporate matters is here involved. This was clearly recognized by the Ohio Supreme Court.

There being no actual notice, any attempt to sustain due process must be on the basis of constructive or imputed notice. When §8623-65 and §8623-72 are construed separately, when it is held that individual rights are here involved and that the board of directors is not the representative of the majority shareholders under such circumstances as are here involved, and when, in effect, it is held that the majority have not consented to any different relationship—all as held by the Supreme Court of Ohio, then, we submit, this Court should conclude, as did that Court, that the majority shareholders received no notice and were accordingly denied due process.

VI.

The Majority Shareholders Had No Opportunity to Be Heard.

In the absence of notice of the demands, the majority, of course, could not act to protect their interests. But even if it be assumed that they had notice, they still were

powerless to act. They still were without opportunity to be heard.

It is urged by petitioners that during the six months' period the majority shareholders could have compelled the corporation to act, or upon its refusal to act, could have brought an action in the name of the corporation, and that the requirement of opportunity to be heard is thus satisfied. (Petitioners' brief, pp. 30-32.) In support of this argument petitioners cite authorities which hold that shareholders, where irreparable injury is threatened to the corporation and it refuses to act on demand, may bring an action in its name. This is unquestionably the law. The instances, however, in which shareholders have been accorded the right to maintain an action for a corporation have been those in which *they have had knowledge* of some danger threatening their rights and in which the corporation itself *refuses* to bring an appropriate action to prevent the threatened injury. Even in such cases there must be a showing of fraud or breach of trust by officers or directors. 14 *C. J.* 924; 13 *Am. Juris.* 504; 6 *Thompson on Corporations*, 452; 10 *O. Juris.* 343, 352, 361. Here the majority shareholders could not know that action would not be taken by the corporation until the last minute of the last hour of the last day, when it would be too late. The assumed notice of the demands would not carry with it knowledge that the corporation would not bring an action within the six months period.

The Supreme Court of Ohio, however, has properly held that the suggested procedure was not, in these circumstances, available to the majority shareholders. There is no suggestion in §8623-72 that such procedure may be followed. That Court held that the majority

shareholders, in this situation, have no standing in the courts of Ohio to maintain such an action. This is a decision on the procedural law of Ohio which, under the decisions of this Court, will be accepted by this Court. Moreover, the Ohio Supreme Court has also held, in construing §8623-72, that majority shareholders cannot maintain an action the object of which is to have the fair cash value of dissenters' shares determined, this being limited by the statute to the corporation and the dissenters. This also is a purely procedural matter governed solely by the law of Ohio. Thus, in Ohio, there was no procedure by which the majority had an opportunity to be heard.

Petitioners' reference to the intervening petition of Bertha K. Krauss (R. 67) filed in this case in the Common Pleas Court, lends no support to their contention on this point because this action was brought *after* the six months had expired. As pointed out above, she clearly could not have *intervened* within the six months' period.

VII.

Miscellaneous Points.

Principles of Statutory Construction.

The argument (petitioners' brief, p. 28) that the statutes in question should be liberally construed in favor of minority shareholders misses the point. There is no ambiguity in the statute. Hence no construction is required and that principle is not involved. The question is purely and simply one of constitutionality with the attendant requirement that every reasonable presumption in favor of constitutionality will be indulged.

It will be readily seen that this principle and the principle of liberal construction are not to be confused. They are not cumulative. The authorities cited by opposing counsel on this point have no bearing on the constitutional issue with which we are here concerned.

Practical Operation of Statute.

It is urged that, without the conclusive presumption provision, §8623-72 is unworkable, and will cause confusion. While this argument is not properly addressed to this Court, it is also untenable.

Other amendments of this section added in 1929 and in 1931 disclose that the inclusion of the conclusive presumption was unnecessary. Without it the dissenting shareholder still has the right to bring an action within the six months' period to have the fair cash value of his shares determined. In such action the fair value of his shares will be determined in a perfectly constitutional manner. There is no added burden to the corporation. The demands having been made and whether or not counter-offers are made, a suit begun within the six months' period will afford full protection. *Williams v. National Pump Corp.*, 46 O. App. 427; 188 N. E. 756 (1933); *Miller v. Canton Motor Coach, Inc.*, 58 O. App. 94; 16 N. E. (2d) 486 (1937); appeal dismissed 133 O. S. 384; 14 N. E. (2d) 15 (1938). Even if the dissenter does not bring an action within this period his rights as a shareholder are bound to be recognized and preserved. If no action is brought, the dissenter is simply relegated to his pro-rata share with the other shareholders.

There is nothing in the suggestion that the dissenting shareholders must notify the majority shareholders of

their demands. All the dissenting shareholders have to do not prevent the conclusive presumption from arising is to file their actions within the six months' period. Other difficulties suggested by petitioners which will result from the decision below are wholly imaginary. Moreover, the questions suggested as to the operation of the other provisions of §8623-72 are beside the point because the only question here involved is the validity of the conclusive presumption provision. We know, from previous decisions of Ohio courts, that the other provisions of the statute are valid, and whether there is any possible invalid operative effect other than that produced by the conclusive presumption is a question for future determination. These matters of the practical operation of the statute are all matters for the legislature and courts of Ohio and have nothing to do with the unconstitutionality of the conclusive presumption provision.

Estoppel.

Petitioners argue (pp. 37-38 of their brief) that, even if the statute in question is unconstitutional, this defense cannot be successfully urged here because respondents are estopped by their conduct to urge this defense. We have no quarrel with the cases cited on this point by petitioners, but the principle urged is not applicable here. The ingenious suggestion is made that, because the shareholders availed themselves of the provisions of §8623-65 in order to authorize the sale of the assets, coupled with the reference in that section to the relief afforded to dissenters under the provisions of §8623-72, they are now estopped to urge the unconstitutionality of the seventh unnumbered paragraph of the latter section.

In other words, it is argued that §8623-65 and §8623-72 are, in effect, one statute and having invoked the provisions relating to sale, the conduct of the majority estops them from urging the defense of unconstitutionality. As stated above, §8623-65 merely prescribes the procedure that must be followed when a corporation sells or otherwise disposes of all or substantially all of its assets. True, it refers to relief which the dissenters may have, in such circumstances, under later provisions of the code which are embodied in §8623-72. But obviously the two sections deal with entirely different subject matters—the one with sale and the other with rights of dissenters The convenient cross-reference in the former does not make them one section. They are separated by six other sections. Neither the corporation nor the majority shareholders ever invoked the provisions of §8623-72.

It is at once apparent that this entire argument is based upon statutory construction. The Supreme Court of Ohio having construed the statutes against the contention of the petitioners, the argument itself falls since this Court will not concern itself with the construction of state statutes. *Gregg Dyeing Co. v. Query,* supra; *Herbert v. Louisiana,* supra. Moreover, this argument involves a non-federal question on which the decision of the state Supreme Court (R. 81) is final. *Neblett v. Carpenter,* supra.

Res Judicata.

The attempt to invoke this doctrine is based upon the order of Judge Reynolds, in the Common Pleas Court, in sustaining a motion to strike from the files the inter-

ening petition filed by one of the majority shareholders. Petitioners' brief, p. 22.) This motion was made and he order entered as a *procedural* matter involving *parties* to the action, which was in no sense a submission of he case on the *merits*. It is elementary and is well settled in Ohio that *res judicata* is not available unless there a determination on the merits.

Hizar v. Cowan, 51 O. App. 1; 199 N. E. 196 (1935).
Detroit Fidelity & Surety Co. v. Keys, 14 O. L. A. 76 (1932).
White Estate, etc., v. Trustees, 21 O. L. A. 528, (1936).
Harding v. Talbott, 60 O. App. 523; 22 N. E. (2d) 221 (1938).

This again is plainly a question of local law relating o a procedural matter applicable to Ohio courts. It is a on-federal question with which this Court is not conerned. Again, the Ohio Supreme Court has spoken onclusively (R. 81).

CONCLUSION.

We respectfully submit that the conclusive presumption provision of §8623-72 denied the majority shareolders notice and an opportunity to be heard and that ney were accordingly denied due process. This constiutional right of the majority shareholders has been upeld by the Supreme Court of Ohio and its decision, we ubmit, should be affirmed by this Court.

FRANCIS J. WRIGHT,
Attorney for Respondents.

EARL F. MORRIS,
CHARLES A. SCHWENKER,
ARNOLD, WRIGHT, PURPUS & HARLOR,
KRUMM & SCHWENKER,
Of Counsel for Respondents.

Blank Page

SUPREME COURT OF THE UNITED STATES.

No. 97.—October Term, 1940.

Olga E. Voeller, et al., Petitioners,
vs.
The Neilston Warehouse Company, et al., Respondents.

On Writ of Certiorari to the Supreme Court of Ohio.

[January 6, 1941.]

Mr. Justice Black delivered the opinion of the Court.

We granted certiorari in this case to review a decision of the Supreme Court of Ohio invalidating a state statute on the ground that it constituted a denial of procedural due process guaranteed by the Fourteenth Amendment.[1] The statute in question provided that the value placed upon his stock by a dissenting shareholder should, after six months and under certain circumstances, "conclusively be deemed to be equal to" the fair cash value.[2] The state court held that since the statute required that the demands of the dissenters be made known only to the corporation, the majority shareholders were unconstitutionally deprived of property without notice and an opportunity to be heard.

Concretely, the question was raised here in the following manner: Petitioners, holders of stock in respondent corporation, were among those who dissented when a vote was called on a sale of substantially all the corporate assets. Two-thirds of the shareholders voted for the sale, which was thereupon consummated. Petitioners gave written notice to the corporation of their objection, the number of shares they held, and the claimed fair cash value of their stock. The corporation refused in writing to pay the amount asked, but made no counter-offer. Neither party filed a petition for appraisal. After six months had elapsed, petitioners filed suit in the Court of Common Pleas, asking that judgment be rendered in their favor for the amounts originally claimed.

1 136 Ohio State 427, 26 N. E. (2d) 442.

2 Ohio Code Ann. (Throckmorton, 1940) § 8623-72, paragraph 7.

All of these proceedings were in accordance with the applicable Ohio law.[3] In their suit, petitioners relied on a section of that law which provided that the value claimed by the dissenting shareholders should "conclusively be deemed to be equal to" fair cash value if the corporation had neither made a counter-offer nor requested an appraisal.[4] One of the majority shareholders filed an intervening petition on behalf of herself and all other shareholders similarly situated, alleging that the section of the statute involved was unconstitutional. A judge of the Court of Common Pleas struck out this intervention at the request of petitioners, saying that the statute was constitutional, the petition for intervention irrelevant, and the majority shareholders without standing to intervene.[5] No appeal was taken from this ruling. When the case came on for trial on the merits, a different judge sat, and it was his opinion that the statute was unconstitutional. The Court of Appeals, one judge dissenting, reversed the trial court, and was itself reversed, two judges dissenting, by the Supreme Court of Ohio.

It was the opinion of the Supreme Court that the statute had "an unconstitutional operation against the majority stockholders, as being violative of the due process section of the Fourteenth Amendment to the federal Constitution." And the correctness of that conclusion is the only question properly before this Court. All other questions presented involve state law, for the conditions under which corporations shall organize and operate are matters within the exclusive province of the state, so long as those conditions do not clash with the national Constitution.

We agree with petitioner's position that notice to the corporation of the demand for payment constituted notice to the majority stockholders, and that such notice was an adequate compliance with the constitutional requirement of due process. The objective of the Ohio statute permitting the right of appraisal to dissenting share-

[3] Ohio Code Ann. (Throckmorton, 1940) §§ 8623-65, 8623-72.

[4] The exact language is: "If such petition [for appraisal] is not filed within such period, the fair cash value of the shares shall conclusively be deemed to be equal to the amount offered to the dissenting shareholder by the corporation if any such offer shall have been made by it as above provided, or in the absence thereof, then an amount equal to that demanded by the dissenting shareholder as above provided."

[5] The judge said: "The failure to take advantage of the statutory provisions may result unfortunately for other stockholders, but their remedy would be against those directors who were derelict in their duty."

holders was the elimination of abuses that had long been a fixture in the field of corporate finance.[6] To assure that the right to appraisal would be promptly resorted to and to provide for the contingency that in some cases no such resort would be taken, the Ohio legislature thought it advisable to provide that under some circumstances the original offer or counter-offer should conclusively be deemed equal to the fair cash value. The corporation was given the right to avoid the effect of being compelled to pay the claimed value either by making a counter-offer or by requesting an appraisal. In addition, it was given the right to avoid both appraisal and payment of the claimed value by abandoning its original purpose to sell its assets. The dissenting shareholders could, by requesting an appraisal, likewise avoid accepting the corporation's counter-offer. Thus the corporation is compelled to pay or the dissenting shareholder to accept payment of the amount of the offer or counter-offer only if none of the many available alternatives are pursued before the expiration of a six-month period. The provisions in effect operate as statutes of limitations. After the lapse of a period of time, given defenses—attacks on value—can no longer be asserted.

It is true, as respondent urges, that after the majority authorizes the corporation to effect a sale, the alternatives are thereafter expressly open only to the corporation and the dissenters; no provision is made for notice to the majority shareholders as individuals. But the majority, by their vote approving the sale of assets, have indicated their intention to remain part and parcel of the corporation; the dissenters, on the other hand, by voting against the sale and by demanding payment, have indicated an intention to sever relationships. If thereafter the failure of the directors to make a counter-offer materially prejudices the financial stake of the majority, it is no more a want of due process to consider the majority bound

[6] At common law, unanimous shareholder consent was a prerequisite to fundamental changes in the corporation. This made it possible for an arbitrary minority to establish a nuisance value for its shares by refusal to cooperate. To meet the situation, legislatures authorized the making of changes by majority vote. This, however, opened the door to victimization of the minority. To solve the dilemma, statutes permitting a dissenting minority to recover the appraised value of its shares, were widely adopted. See S. E. C. Report on the Work of Protective and Reorganization Committees, Part VII, pp. 557, 590. The Ohio appraisal statute here in issue was not adopted until after respondent had acquired its charter, but the Ohio Constitution expressly reserves to the state the right to alter or repeal the corporate law. Ohio Const., Art. 13, § 2.

thereby than it is to consider them bound by any other act of management. The majority are participants in a corporate enterprise. In entrusting their capital to the corporation, they accept the disadvantages of the corporate system along with its advantages. What is claimed to be a disadvantage here is a necessary concomitant of the system and its most distinctive attribute—representation of the collective interest of shareholders by selected corporate management.

The constitutional issue is here raised for the majority shareholders by the corporation, which admittedly itself had notice. Exercising the very delicate responsibility of passing upon the validity of state statutes, this Court has many times declared the rule that only those who have been injured as the result of the denial of constitutional rights can invoke our jurisdiction on constitutional questions.[7] Yet here the corporation would have us say that it is sufficiently the representative of the majority to raise in their behalf the constitutional issue, but not sufficiently their representative to receive notice. We hold that, so far as the constitutional requirement of due process is concerned, it is in this case sufficiently their representative for both purposes, and accordingly we find it necessary to reverse the judgment below.[8]

There is nothing unusual in such a holding; the rights of parties are habitually protected in court by those who act in a representative capacity; an executor or administrator may act for the beneficiaries of an estate; a receiver may represent the collective interests of stockholders, partners, or creditors; a lawyer may appear for his clients; and a corporation may represent the collective interests of its shareholders. In this case, in fact, the unappealed ruling of the trial judge on the attempted intervention by the majority stands as an adjudication that in those respects here material the majority had committed their interests to the corporation itself.

Reversed.

---

[7] Tyler *v.* Judges, 179 U. S. 405; Hendrick *v.* Maryland, 235 U. S. 610, 621. And see Mr. Justice Brandeis, concurring, in Ashwander *v.* Tennessee Valley Authority, 297 U. S. 288, 347-348, and cases there cited.

[8] Christopher *v.* Brusselback, 302 U. S. 500, 504; cf. Kersh Lake Drainage District *v.* Johnson, 309 U. S. 485, 491.